Supreme Court, U.S.
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RECORD NO. 00-82

In The
Supreme Court of the United States

ARPAD ANTON CHABAFY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

James F. Wyatt, III
Counsel of Record
LAW OFFICES OF JAMES F. WYATT, III
435 East Morehead Street
Charlotte, North Carolina 28202-2609
(704) 331-0767

Counsel for Petitioner

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

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QUESTION PRESENTED

Whether Franks v. Delaware should be extended to permit the Court to suppress evidence where an agent deliberately omits material information in a search warrant concerning the attorney/client privilege.

TABLE OF CONTENTS

Question Presented i

Table Of Contents ii

Table Of Authorities iii

Opinion Below 1

Basis Of Jurisdiction 1

Constitutional Provision Involved 1

Statement Of The Case 2

Reasons For Granting The Writ 5

Appendix ..... App.i

TABLE OF AUTHORITIES

Cases

Chore-Time Equipment, Inv. v. Big Dutchman, Inc.,
255 F. Supp. 1020 (W.D. Mich. 1966) 8

DeMassa v. Nunez,
747 F.2d 1283 (9th Cir. 1984), on rehearing,
770 F.2d 1505 (9th Cir. 1985) 11

Franks v. Delaware,
438 U.S. 154 (1978) ..... passim

Haines v. Liggett Group, Inc.,
975 F.2d 81 (3d Cir. 1992) 8

In re Grand Jury Subpoenas Dated December 10, 1987
v. United States,
926 F.2d 847 (9th Cir. 1991) 10

In re Impounded Case (Law Firm),
879 F.2d 1211 (3d Cir. 1989) 10

Klitzman, Klitzman and Gallagher v. Krut,
744 F.2d 955 (3d Cir. 1984) 11

National City Trading Corp. v. United States,
635 F.2d 1020 (2d Cir. 1980) 10

O'Rourke v. Darbishire,
A.C. 581 (1920) 8

United States v. Colkley,
889 F.2d 297 (4th Cir. 1990) 6

United States v. Friedemann,
210 F.3d 227 (4th Cir. 2000) 1

United States v. Jacobs,
117 F.3d 82, (2d Cir. 1997) 9

United States v. Jacobs,
986 F.2d 1231 (8th Cir. 1993) 6

United States v. Mittleman,
999 F.2d 440 (9th Cir. 1993) 13, 14

United States v. Neill,
952 F. Supp. 834 (D.D.C. 1997) 11

United States v. Owens,
882 F.2d 1493 (10th Cir. 1989) 7

United States v. Reivich,
793 F.2d 959 (8th Cir. 1986) 7

United States v. Rettig,
589 F.2d 418 (9th Cir. 1978) 11, 12

United States v. (Under Seal),
33 F.3d 342 (4th Cir. 1994) 8, 9

United States v. (Under Seal),
884 F.2d 124 (4th Cir. 1989) 8

United States v. Valencia,
541 F.2d 618 (6th Cir. 1976) 8

United States v. Zolin,
491 U.S. 554, 109 S.Ct. 2619 (1989) 7, 8, 9

UpJohn Co. v. United States,
449 U.S. 383 (1981).....7

Constitutional Provision

United States Constitution, Amendment IV 1, 10

Other Authority Cited

8 C. Wright & A. Miller,
Federal Practice and Procedure § 2017 (1970).....8

8 J. Wigmore, Evidence § 2290
(McNaughton rev. 1961) 7

McCormick on Evidence § 92
(E. Cleary 3d ed. 1984).....8

Model Rules of Professional Conduct
Rule 1.6 (1983) 8

North Carolina Rule of Professional Conduct 1.6 8

28 U.S.C. § 1254(1).....1

OPINION BELOW

Francis Kenneth Friedemann and Arpad Antoine Chabafy respectfully petition the Supreme Court of the United States for a Writ of Cetiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered and rendered in Case No. 99-4275 of that Court on April 6, 2000, which reversed the judgment of the United States District Court for the Western District of North Carolina.

The opinion of the Court of Appeals is reproduced in the appendix filed herewith ("App.") at App. 1, and is reported as United States v. Friedemann, 210 F. 3d 227 (4th Cir. 2000).

BASIS OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 6, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Amendment IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On August 21, 1996, agents of the Federal Bureau of Investigation conducted a sting operation by arranging a meeting between Arpad Chabafy ("Mr. Chabafy"), an architect, and Francis Friedemann ("Mr. Friedemann"), an attorney, in a hotel in Charlotte, North Carolina. Mr. Friedemann and Mr. Chabafy each carried a briefcase to this meeting, and Mr. Friedemann carried a leather pouch. FBI Agent Julia Mueller posed as a lender during the meeting and engaged in conversations with Mr. Chabafy and Mr. Friedemann which were secretly videotaped. During these conversations, Agent Mueller confirmed details relating to the lending of $5,000,000 based upon a Canadian certificate of deposit. The Government alleges that the certificate of deposit was in fact worth only $5,000, that Mr. Chabafy and Mr. Friedemann were aware of this, and that they were part of an alleged scheme to obtain a loan for $5,000,000 based upon a $5,000 instrument. Mr. Chabafy and Mr. Friedemann steadfastly deny these allegations.

At the end of the meeting, FBI agents arrested Mr. Chabafy and Mr. Friedemann and seized their respective briefcases and the pouch belonging to Mr. Friedemann. An FBI agent looked briefly through each of the bags at the motel to determine if any weapons were located in the bags.

The agents attempted to interview both Mr. Chabafy and Mr. Friedemann. Mr. Friedemann refused to make a statement, and his refusal was duly noted on a written Miranda waiver-of-rights form. Agent Timothy Klund testified at the suppression hearing that Mr. Friedemann informed the agents that he was an attorney. When Agent Klund requested permission to search Mr. Friedemann's briefcase, Mr. Friedemann refused to consent to such a search. Agent Klund testified that Mr. Friedemann stated that he could not consent to a search of the files in his briefcase because they were "attorney/client privileged files." Agent Klund further testified that the fact that Mr.

Friedemann refused to consent to a search based on attorney/client privilege grounds was conveyed to Agent Bart Bodee.

Agent Bodee subsequently prepared affidavits in support of warrants to search Mr. Friedemann's and Mr. Chabafy's bags. Agent Bodee, an experienced FBI agent and law school graduate, testified at the suppression hearing that he was informed that Mr. Friedemann was an attorney prior to the sting operation on August 21, 1996. Agent Bodee further testified that he was reminded of Mr. Friedemann's status as an attorney during the sting operation. Notwithstanding this knowledge, and notwithstanding the fact that Agent Bodee knew that Mr. Friedemann had refused to allow his bags to be searched because they contained files subject to the attorney/client privilege, Agent Bodee failed to disclose these critical facts to the Magistrate Judge who issued the search warrants. In fact, the affidavits in support of the search warrants merely indicated that the briefcases contained "business papers."

On September 3, 1996, Mr. Friedemann and Mr. Chabafy were indicted for aiding and abetting each other on one count of mail fraud and three counts of wire fraud. Mr. Friedemann and Mr. Chabafy filed a motion to suppress all evidence seized from their bags, and an evidentiary hearing was held before United States Magistrate Judge Carl Horn. On May 30, 1997, Magistrate Judge Horn entered a Memorandum and Recommendation, recommending that the motion to suppress evidence seized from the briefcases and pouch be denied.

Mr. Chabafy and Mr. Friedemann appealed from the Magistrate Judge's Recommendation, and additional evidentiary hearings were held by the District Court. Thereafter, on March 18, 1999, United States District Court Judge Graham C. Mullen entered an order granting Mr. Chabafy's and Mr. Friedemann's motion to suppress the evidence seized from the briefcases and pouch. The Court determined that the agents' failure to disclose on the search

warrant affidavits that Mr. Friedemann was an attorney who refused to consent to the search of his bags on the grounds that the contents were protected by the attorney/client privilege constituted a violation of Franks v. Delaware. Moreover, the Court found that "the violation [of Franks] was so flagrant that the warrants in question must be voided and all evidence gathered pursuant to them must be suppressed."

Following the Government's appeal, the United States Court of Appeals for the Fourth Circuit reversed the District Court's order. The Fourth Circuit determined that Franks was inapplicable to the facts of the case because the case did not involve a misrepresentation or omission that altered the probable cause calculus. According to the Court, "[e]ven assuming that the failure to include Friedeman's assertion of the attorney/client privilege in the warrant affidavit was intentional or reckless ... the fact remains that the question whether a document is privileged has nothing at all to do with the separate question whether there existed probable cause to justify the issuance of a warrant to seize that document."

REASONS FOR GRANTING THE WRIT

FRANKS V. DELAWARE SHOULD BE EXTENDED TO PERMIT THE COURTS TO SUPPRESS EVIDENCE SEIZED WHEN AN AGENT DELIBERATELY OMITS INFORMATION IN OBTAINING A SEARCH WARRANT CONCERNING THE ATTORNEY/CLIENT PRIVILEGE.

The Fourth Amendment to the United States Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation ...." U.S. Const. Amend. IV. The Supreme Court of the United States has held that this clause is the "bulwark of Fourth Amendment protection," and that the clause "takes the affiant's good faith as its premise[.]" Franks v. Delaware, 438 U.S. 154, 164 (1978). In Franks, the Supreme Court held that a defendant may challenge the validity of a search warrant by showing that police officers set forth false or misleading statements in a warrant affidavit and that the false statements were necessary to the finding of probable cause. Id. at 155-56. The Court's principal concern in Franks was preventing law enforcement officers from obtaining search warrants by providing false and misleading information to the magistrate. Indeed, the Supreme Court observed that:

> "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a truthful showing". This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own

> knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true. It is established law ... that a warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter. ... Because it is the magistrate who must determine independently whether there is probable cause, ... it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or reckless false statement, were to stand beyond impeachment.

Id. at 164-65. Evidence seized pursuant to a warrant obtained in violation of Franks must be suppressed. See id. at 171-72; see also United States v. Jacobs, 986 F.2d 1231, 1235 (8th Cir. 1993).

The Supreme Court's decision in Franks did not address every conceivable situation in which a magistrate judge is misled by an affiant. For example, Franks did not address the situation where an affiant misleads a magistrate judge by deliberately or recklessly omitting material information from a search warrant affidavit as opposed to providing the magistrate judge with deliberate falsehoods. However, this situation has been subsequently addressed by the circuit courts, who have uniformly ruled that Franks should be extended to protect against omissions that are designed to mislead, or that are made in reckless disregard of whether they would mislead, the magistrate. For example, in United States v. Colkley, 899 F.2d 297 (4th Cir. 1990), the Fourth Circuit held that the Franks test applies when affiants omit material facts "'with the intent to make, or in reckless

disregard of whether they thereby made, the affidavit misleading.'" Id. at 300-01 ("Franks protects against omissions that are designed to mislead, or that are made in reckless disregard of whether they would mislead, the magistrate."); see also United States v. Owens, 882 F.2d 1493, 1498-99 (10th Cir. 1989); United States v. Reivich, 793 F.2d 959, 960-61 (8th Cir. 1986).

Franks also did not address the situation where an affiant deliberately or recklessly fails to inform the magistrate that the subject of the search may involve materials that are protected by the attorney/client privilege (or any other applicable privilege). Indeed, the issue of privilege did not arise in Franks, and the Court has not subsequently considered the issue of privilege in the context of omissions or falsehoods made by an affiant in the process of obtaining a search warrant. Because of the well established importance of the attorney/client privilege, and because an attorney can now literally carry all his office files in his briefcase in this computerized age, the Court should grant certiorari in this case and decide the proper remedy to be applied by courts when an agent deliberately omits information in obtaining a search warrant that allows the agent to circumvent the attorney/client privilege and review privileged documents.

The United States Supreme Court has recognized that the attorney/client privilege is the oldest confidential communications privilege known to the common law. United States v. Zolin, 491 U.S. 554, 109 S.Ct. 2619 (1989); UpJohn Co. v. United States, 449 U.S. 383, 389 (1981); 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). The purpose of the privilege is to encourage full and frank communication between attorneys and their clients and thereby promote broader interests in the observance of law and administration of justice. UpJohn Co., 449 U.S. at 389. "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by

the client." Id. Courts have noted that the "'attorney-client privilege is so sacred and so compellingly important that the courts must, within their limits, guard it jealously.'" See Haines v. Liggett Group, Inc., 975 F.2d 81, 90 (3d Cir. 1992) (quoting Chore-Time Equipment, Inc. v. Big Dutchman, Inc., 255 F. Supp. 1020, 1021 (W.D. Mich. 1966)); see also United States v. Valencia, 541 F.2d 618 (6th Cir. 1976) (governmental intrusion into attorney/client relationship may, in certain circumstances, justify dismissal of indictment or reversal of conviction).

Documents within the scope of the attorney/client privilege are "zealously protected." 8 C. Wright & A. Miller, Federal Practice and Procedure § 2017 (1970); see also Haines, 975 F.2d at 90. Although the privilege belongs to the client and only he may waive it, an attorney may assert the privilege on his client's behalf. McCormick on Evidence § 92 (E. Cleary 3d ed. 1984). In fact, the canons of ethics make the attorney's common law obligation to maintain the secrecy of his communications with his client a professional mandate. See Model Rules of Professional Conduct Rule 1.6 (1983); North Carolina Rule of Professional Conduct 1.6.

While otherwise privileged documents may be subject to review pursuant to the crime-fraud exception to the attorney/client privilege, the crime-fraud exception does not permit agents to engage in the wholesale review of documents in an attorney's law office or briefcase. The crime-fraud exception to the attorney/client privilege provides that a client's communications with an attorney are not privileged if made for the purpose of committing or furthering a crime, tort or fraud. See United States v. (Under Seal), 33 F.3d 342, 348 (4th Cir. 1994); United States v. (Under Seal), 884 F.2d 124, 127 (4th Cir. 1989); The purpose of this exception is to ensure that "the 'seal of secrecy' between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." Zolin, 491 U.S. at 563 (quoting O'Rourke v. Darbishire, A.C. 581, 604 (1920)). In

order to overcome the privilege, the government must make a prima facie showing that the communications sought fall within the crime-fraud exception. (Under Seal), 33 F.3d at 348.

Thus, the mere fact that Mr. Friedemann and Mr. Chabafy carried briefcases during a monitored meeting with federal agents does not mean that each and every document in their briefcases was non-privileged and subject to review pursuant to the crime-fraud exception. Indeed, by analogy, if Mr. Friedemann was arrested in his law office for fraudulent conduct, every file in his office would not be subject to seizure. Such a result would strike all meaning from the attorney/client privilege, and result in the privileged nature of numerous documents being irreparably violated.

In order to safeguard the attorney client privilege, courts typically engage in in camera review of allegedly privileged attorney-client communications where an issue is raised as to whether such communications fall within the crime-fraud exception. In fact, in Zolin, the Court expressly approved of in camera review by courts to determine whether allegedly privileged attorney-client communications fall within the crime-fraud exception. 491 U.S. at 574. Of course, opponents of the attorney-client privilege are not automatically entitled to have a court review allegedly privileged documents for the purpose of determining if the documents have lost their privileged nature. Id. at 571-73. Rather, "[b]efore engaging in in camera review to determine the applicability of the crime-fraud exception, the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person ... that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." Id. at 572 (internal quotation omitted); see also United States v. Jacobs, 117 F.3d 82, 87 (2d Cir. 1997) ("A party wishing to invoke the crime-fraud exception must demonstrate that there is a factual basis for a showing of probable cause to believe that a fraud or crime has been committed and that the

communications in question were in furtherance of the fraud or crime. This is a two step process. First, the proposed factual basis must strike "a prudent person" as constituting "a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof." ... Once there is a showing of a factual basis, the decision whether to engage in an in camera review of the evidence lies in the discretion of the district court.").

Where law enforcement officers seek a search warrant to review materials that may be protected by the attorney/client privilege, the magistrate judge must be careful to ensure that adequate safeguards are in place to ensure that privileged materials are not reviewed.[1] See National City Trading Corp. v. United States, 635 F.2d 1020, 1026 (2d Cir.1980) ("a law office search should be executed with special care to avoid unnecessary intrusion on attorney-client communications."). A number of courts have concluded that the best method of safeguarding attorney/client privileged documents is by requiring law enforcement officers to turn any documents seized over to the court for an in camera review. See e.g. In re Grand Jury Subpoenas Dated December 10, 1987. v. United States, 926 F.2d 847, 858 (9th Cir. 1991) (following search of law offices, documents were sealed and delivered to district court for an in camera inspection); In re Impounded Case (Law Firm), 879 F.2d 1211, 1214 (3d Cir. 1989) (in case involving seizure of documents from law office in connection with criminal investigation of attorney, "disclosure of [seized document] can be obtained only in a context where the district court will first evaluate, in camera, the right of the government to gain access to the documents."). Similarly,

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[1] Of course, such safeguards should be employed whether the government seeks to search an entire law office or an attorney's briefcase. Indeed, with today's computer technology, an attorney may carry virtually his entire files in his briefcase via a computer disc.

other courts have appointed a special master to protect the privileged nature of seized documents. See e.g., DeMassa v. Nunez, 747 F.2d 1283, 1288 (9th Cir. 1984), on rehearing, 770 F.2d 1505, 1506 (9th Cir. 1985) (after 1100 attorney/client files had been seized from a targeted law firm, the district court prevented the government from appointing its own "taint team" to review the privileged files and required a special master to be appointed to adequately protect privileged documents).

Courts have strongly criticized and sanctioned the government's failure to follow one of the above safeguard procedures. See Klitzman, Klitzman and Gallagher v. Krut, 744 F.2d 955, 959-62 (3d Cir. 1984) (where government "completely disregarded any concept of the attorney-client privilege" by failing to take "one step to minimize the extent of [a law office] search or to prevent the invasion of the clients' privacy guaranteed by the attorney-client privilege[,]" court affirmed district court's order requiring government to return materials to law firm). Indeed, even the appointment of a government "taint team" to safeguard privileged materials has been held to constitute a per se intentional intrusion upon the attorney/client privilege. See United States v. Neill, 952 F. Supp. 834, 840-41 (D.D.C. 1997).

Where, as in the present case, the government misleads the magistrate judge by deliberately failing to inform him that the materials sought may include privileged documents, and then proceeds to conduct a search without employing any safeguards to protect the confidential nature of the potentially privileged documents, it is a virtual certainty that the attorney-client privilege will be disregarded and that the privileged nature of numerous documents will be lost. In this situation, not only is the attorney/client privilege eviscerated, but the magistrate judge is deprived of the opportunity to exercise meaningful supervision over the officer's conduct and to set the proper dimensions of the search. See United States v. Rettig, 589 F.2d 418, 422-23

(9th Cir. 1978) ("A judicial officer cannot perform the function of issuing a warrant particularly describing the places to be searched and the things to be seized, and of supervising the proper return of such process, where the police fail to disclose an intent to conduct a search the purposes and dimensions of which are beyond that set forth in the affidavits.").

Because an agent who misleads a magistrate judge regarding issues of privilege in applying for a search warrant is able to (1) completely circumvent the attorney/client privilege, (2) usurp the magistrate judge's role in setting the proper limits of the warrant, and (3) effectively undermine the issuance of the search warrant, the Supreme Court should extend Franks to address this situation and permit courts to suppress evidence seized in connection with such search warrants.[2] Suppression of the evidence in this situation is necessary to deter the agent's conduct and to ensure that the attorney/client privilege is not blatantly disregarded in future cases. In fact, the Fourth Circuit's opinion in the present case effectively permits a dishonest agent to deceive the magistrate judge and ramble through attorney/client privileged material at his or her own discretion. Indeed, if Franks is not extended to the present case, and the evidence is not suppressed, agents will have no incentive in future cases to alert the magistrate judge to issues of privilege in applying for a search warrant. The Government will, in effect, be allowed to benefit by not bringing issues of privilege to the attention of the Court.

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[2] While courts should have discretion in determining the scope of suppression under Franks, it is important to note that suppression of only the items seized in violation of the attorney/client privilege may be an insufficient remedy. Once attorney/client privileged materials are reviewed by an unscrupulous agent, the confidential nature of the materials is destroyed and the attorney/client privilege is irretrievably lost with respect to all items reviewed.

It appears that only one other circuit court has considered the issue of the attorney/client privilege in the context of Franks. In United States v. Mittleman, 999 F.2d 440, 441 (9th Cir. 1993), an FBI agent represented in a search warrant affidavit that he would follow certain procedures set forth in the American Law Institute's Model Code of Pre-Arraignment Procedure in performing a law office search. Because the agent did not actually follow those procedures in conducting the search, the district court found that the agent's misrepresentations resulted in "a search inconsistent with the magistrate's reasonable expectations." Id. Consequently, the district court determined that the evidence seized should be suppressed pursuant to Franks v. Delaware. Id.

On appeal, the Ninth Circuit determined that Franks was not applicable to the facts of the case. Id. at 444. The Court found that the agent's false statements "related exclusively to the manner in which the search was conducted" and "did not relate at all to the issue of probable cause nor, by analogy, did they relate to the issue of necessity." Id. Consequently, the Court concluded that the district court erred by suppressing all of the evidence seized on the ground that the agent misrepresented how the search would be conducted. Id. at 444.

The Ninth Circuit's decision in Mittleman illustrates the absurdity in not extending Franks to apply to situations where the magistrate is misled as to issues of privilege. While the magistrate in Mittleman was at least put on notice that the subject of the search involved materials that were potentially protected under the attorney/client privilege -- unlike the Magistrate Judge in the present case -- the agent in Mittleman deliberately misled the magistrate into believing that procedures would be followed to safeguard the confidential interests at stake. In fact, the agent's misrepresentations to the magistrate were patently false and "lulled the magistrate into concluding that additional special precautions were not necessary." Id. at 442. Although the

agent's misrepresentations in Mittleman did not negate probable cause, the deception allowed the agent to trample through the contents of entire client files in complete derogation of the attorney/client privilege.

In the present case, the agent's reckless and deceptive conduct permitted the agents to search through numerous privileged documents without any measures to protect the confidential nature of such materials. Because the Magistrate Judge was not even put on notice that the search involved potentially privileged documents, the Magistrate Judge was completely denied the opportunity to ensure that adequate measures were employed to protect the privileged nature of such documents. If the attorney/client privilege is to be given any meaning and afforded the zealous protection that it deserves, Franks must be extended to permit suppression of evidence seized where a magistrate judge is deceived as to the issue of privilege in connection with the issuance of a search warrant. Failure to extend Franks to this situation provides no incentive for agents to alert magistrate judges as to issues of privilege, and will effectively permit agents to circumvent the attorney/client privilege and gain access to numerous privileged documents that they would not otherwise be entitled to review. Thus, the Court should grant certiorari in this case and reverse the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

James Frank Wyatt, III
Counsel of Record
LAW OFFICES OF
JAMES F. WYATT, III
435 East Morehead Street
Charlotte, NC 28202-2609
(704) 331-0767

Counsel for Petitioner

TABLE OF CONTENTS
Appendix to the Petition

Opinion,
United States Court of Appeals
for the Fourth Circuit
entered April 6, 2000 ..... App. 1

Order,
United States District Court
for the Western District of North Carolina
Charlotte Division
entered March 18, 1999 ..... App. 7

Memorandum and Recommendation,
United States District Court
for the Western District of North Carolina
Charlotte Division
entered May 30, 1997 ..... App. 34

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-4275

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

FRANCIS KENNETH FRIEDEMANN;
ARPAD ANTON CHABAFY,

Defendants-Appellees.

No. 99-4282

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ARPAD ANTON CHABAFY,

Defendant-Appellant,

and

FRANCIS KENNETH FRIEDEMANN,

Defendant.

Appeals from the United States District Court
for the Western District of North Carolina, at Charlotte.
Graham C. Mullen, District Judge.

(CR-96-146-MU)

Argued: March 3, 2000
Decided: April 6, 2000
Entered: April 6, 2000

Before LUTTIG and TRAXLER, Circuit Judges, and Jackson L. KISER, Senior United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed in part, vacated in part, and remanded by published opinion. Judge Luttig wrote the opinion, in which Judge Traxler and Senior Judge Kiser joined.

COUNSEL

ARGUED: David Alan Brown, Charlotte, North Carolina, for Appellant. James Frank Wyatt, III, LAW OFFICES OF JAMES F. WYATT, III, Charlotte, North Carolina, for Appellees. **ON BRIEF:** Mark T. Calloway, United States Attorney, Brian Lee Whisler, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellant. Harold J. Bender, BENDER & MATUS, Charlotte, North Carolina, for Appellee Friedemann.

OPINION

LUTTIG, Circuit Judge:

The United States appeals from the district court's order granting the motion of defendants Francis Friedemann and Arpad Chabafy to suppress certain evidence obtained

from containers in their possession at the time of their arrest, and Chabafy cross-appeals from the district court's denial of his motion to suppress his statements to Federal Bureau of Investigation (FBI) agents as taken in violation of his Miranda rights. For the reasons that follow, we affirm in part, vacate in part, and remand for further proceedings.

I.

FBI agents staged a transaction wherein they offered a loan to Friedemann and Chabafy, knowing, based on information obtained from a cooperating witness, that the defendants would offer fraudulent security on the loan. During the encounter with undercover agents, the defendants each accessed their briefcases, and Friedemann accessed a pouch. The agents arrested the defendants and conducted a protective sweep of the briefcases and pouch for weapons, but did not seize or examine any of the documents contained therein. Instead, they obtained a warrant to search the briefcases and pouch after filing a search warrant affidavit that omitted reference to the fact that Friedemann, an attorney, had asserted that documents in his briefcase were protected by the attorney/client privilege. Meanwhile, FBI agents read Chabafy his Miranda rights, but he agreed to be interviewed and provided the agents with incriminating statements.

After the defendants were charged with mail and wire fraud, a magistrate judge ruled that the evidence obtained from the briefcases and pouch was admissible, but that Chabafy's statements to the FBI were taken in violation of his Miranda rights and were therefore inadmissible. The district court reviewed both of these issues de novo, and came to a conclusion opposite that of the magistrate in each instance. The United States now appeals from the district court's order granting the defendants' motion to suppress the evidence obtained from the briefcases and pouch, and

Chabafy cross-appeals from the district court's order denying his motion to suppress his statements to FBI agents.

II.

The district court held that the warrant authorizing the search of the two briefcases and pouch was invalid under Franks v. Delaware, 438 U.S. 154 (1978), because the search warrant affidavit filed by federal agents failed to represent that Friedemann had asserted the attorney/client privilege with respect to the documents in his briefcase. J.A. 433-37. The United States argues that the district court misapplied Franks. We agree.

Franks holds that, if a defendant makes an initial showing that a warrant affidavit contained an intentionally or recklessly false statement that was necessary to the finding of probable cause at the time the warrant was issued, he is entitled to a hearing. See id. at 2684-85.* If at the hearing the district court determines that the affidavit does contain such a false statement, and that, in the absence of that statement, probable cause did not exist to support issuance of the warrant, the court ordinarily must exclude the evidence obtained pursuant thereto. Franks thus serves to prevent the admission of evidence obtained pursuant to warrants that were issued only because the issuing magistrate was misled into believing that there existed probable cause.

By contrast, the present case does not involve a misrepresentation or omission that in any way altered the probable cause calculus. Even assuming that the failure to include Friedemann's assertion of the attorney/client privilege in the warrant affidavit was intentional or reckless (an assumption that finds scant support in the record before us), the fact remains that the question whether a document is

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* The courts of appeals, including this court, have extended Franks to apply to omissions, in addition to false statements. See United States v. Colkley, 899 F.2d 297, 300-01 (4th Cir. 1990).

privileged has nothing at all to do with the separate question whether there existed probable cause to justify the issuance of a warrant to seize that document. In other words, the probable cause determination would not have changed in the slightest had the warrant affidavit at issue made clear that Friedemann had asserted the attorney/client privilege with respect to some of the documents seized. Cf. Franks, 438 U.S. at 171-72 ("[I]f, when material [in the warrant affidavit] that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.").

As such, we conclude that Franks is inapplicable on the present facts, and that the district court therefore erred in granting the motion to suppress the evidence at issue.

III.

Chabafy argued below that his post-arrest statements to FBI agents should be suppressed because his Miranda rights, as defined in Edwards v. Arizona, 451 U.S. 477 (1981), were violated when the agents continued to question him in the absence of counsel after he, having initially waived his right to an attorney, requested that counsel be present for any further interrogation. The agents who conducted the interrogation testified that Chabafy never actually requested his attorney. The district court denied Chabafy's motion to suppress his statements, noting that the issue amounted to the question whether the court believed the agents' or Chabafy's version of the events, and that the court found the agents' testimony to be "far more credible" because Chabafy's testimony "varied widely" and was "much more consistent with his self-interest in having his statements suppressed than it [was] with the weight of the evidence and the totality of the circumstances surrounding his arrest and interview." J.A. 430-31. On appeal, Chabafy does not contest that the district court's decision amounted to

a credibility determination, but contends that it was the agents' testimony, rather than his own, that was not credible. On the record before us, however, there is simply no basis for the conclusion that the district court erred, after presiding over a hearing in which both the agents and Chabafy testified, in concluding that the agents' testimony was more believable than that of Chabafy.

We therefore conclude that the district court committed no reversible error in denying Chabafy's motion to suppress his post-arrest statements to FBI agents.

CONCLUSION

For the foregoing reasons, we vacate the district court's order granting the defendants' motion to suppress the evidence obtained from their briefcases and pouch, affirm its denial of Chabafy's motion to suppress his statements to FBI agents, and remand for further proceedings.

IT IS SO ORDERED

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION
3:96-CR-146-MU

UNITED STATES OF AMERICA	)
Plaintiff,	)
v.	)
	)
FRANCIS K. FRIEDEMMAN and	)
ARPAD CHABAFY,	)
Defendants.	

ORDER

Entered: March 18, 1999

I. Introduction

This matter is before the Court upon:

(1) the Memorandum and Recommendation ("M&R") of United States Magistrate Judge Carl Horn, filed May 30, 1997, regarding Defendants' Motion to Suppress; and

(2) the order of Magistrate Judge Horn, filed June 13, 1997, regarding Defendants' Motion to Compel Disclosure of Exculpatory Material.

Both parties objected to portions of the M&R, and the Government appealed the order regarding Defendants' motion to compel. Thus, pursuant to 28 U.S.C. §636(b)(1), the Court is required to:

(1) conduct a *de novo* review of those portions of the M&R to which the parties have objected; and

(2) determine whether Judge Horn's order regarding Defendants' Motion to Compel Disclosure of Exculpatory Material was "clearly erroneous."

On July 31, 1997, the Court held a hearing to consider both of these issues. On August 21, 1997, the Court conducted an additional hearing so that FBI Special Agent James Barnett could be examined as a witness and the parties could sum up their arguments regarding both motions. After an independent and thorough review of the magistrate's memorandum, all substantive objections thereto, a *de novo* review of the record, and the evidence and arguments presented at the hearings, the Court finds:

(1) That the recommendation to grant Defendant's Motion to Suppress as to defendant Chabafy's statements is incorrect and that this portion of Defendant's motion should instead be denied; and

(2) That the recommendation to deny Defendants' Motion to Suppress as to items seized from Defendants' briefcases and Defendant Friedemann's additional bag is incorrect and that this portion of Defendants' motion should instead be granted.

The Court therefore rejects the Memorandum and Recommendation and instead applies the analysis and conclusions that follows with respect to Defendants' Motion to Suppress. Furthermore, the Court concludes that Judge Horn's order regarding Defendants' Motion to Compel Disclosure of Exculpatory Material was not "clearly

erroneous" and that the Government must comply with the order forthwith.

II. Facts

Defendants were indicted on September 3, 1996, for one count of mail fraud and three counts of wire fraud, and aiding and abetting the same. The Government alleges that, on August 21, 1996, during an undercover operation, Defendants attempted to obtain a $4.5 million loan by representing that the loan would be secured by a $5 million certificate of deposit ("CD") held in a Canadian bank when, in fact, the CD only had a value of $5,000. Defendants allegedly referred to documents contained in their respective briefcases in attempting to conduct the transaction.

At the conclusion of this alleged fraudulent transaction, Defendants were arrested and separated. Defendant Friedemann was advised of his rights but identified himself as an attorney, declined to answer further questions, and declined to consent to a search of his briefcase, describing the contents as "privileged." Defendant Chabafy, on the other hand, made extensive statements to the interviewing agents. The Government maintains that Chabafy waived his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), while Chabafy denies that he did so. Chabafy also claims that he identified Friedemann as his attorney and stated that he wanted Friedemann present for any further questions but that the agents ignored his requests and continued the interview. The Government denies this, arguing instead that Chabafy merely indicated that Friedemann was *an* attorney and might have more information than he regarding the agents' questions.

Based on the evidence developed in the undercover operation and information noted in FBI Special Agent Bart Bodee's affidavit, the Government obtained search warrants from Magistrate Judge Horn authorizing the search of Defendant's respective briefcases and of Defendant

Friedemann's additional bag. Defendants note that Bodee's affidavit contained no reference to the fact that Friedemann is an attorney or that he asserted that items in his possession were protected by the attorney-client privilege. Defendants further note that, at the time he presented the warrants to Judge Horn, Agent Bodee claims to have told Judge Horn in an unrecorded statement that Defendant Friedemann was an attorney. After receipt of the search warrants, agents searched the briefcases and additional bag and seized evidence located therein.

III. Motion to Suppress Evidence.

A. Suppression Hearing

On April 3, 1997, Defendants filed the subject Motion to Suppress, asking the Court to suppress evidence seized from the briefcases and bag and the statements made by Defendant Chabafy following his arrest. Judge Horn conducted an evidentiary hearing on May 13, 1997. Of note from the hearing:

> --Agent Bodee testified that both defendants "accessed papers from their respective briefcases during the meeting in which they represented the CD to be worth $5 million.
>
> --Bodee stated that he read Chabafy his Miranda rights, that Chabafy said he understood his rights and agreed to be interviewed, but that Bodee declined to obtain a written waiver of rights from Chabafy.
>
> --Bodee did not recall until his recollection was refreshed that FBI Special Agent James Barnett testified at the probable cause hearing that Chabafy did request that Friedemann be present as his attorney.

--Barnett attempted to "clarify" his earlier statement to mean that Chabafy referred to Friedemann, an attorney, as being in a better position to answer some of the agents' questions.

--Chabafy testified that he advised the agents he wanted his attorney present several times but was told he was unavailable because he too was in custody.

--Chabafy stated that Friedemann was his attorney on this particular project and that he never consented to a search of his briefcase or waived his right to counsel.

B. Memorandum and Recommendation.

Judge Horn issued his Memorandum and Recommendation on May 30, 1997, concluding that Defendants' Motion to Suppress should be granted to Chabafy's statements but denied in regard to the items seized from Defendants' briefcases and Defendant Friedemann's additional bag.

1. Chabafy's Statements.

Judge Horn submits that there is no dispute that Miranda applies and that, if Chabafy asserted his right to counsel, further custodial interrogation should have ceased. The only dispute is whether or not Chabafy waived his right to counsel and whether or not he identified Friedemann as his attorney. In finding that Chabafy's statements should be suppressed, Judge Horn stated:

> On this record, the undersigned cannot conclude with any degree of confidence that Chabafy waived his right to counsel and agreed to the interview in question. To the

> contrary, Mr. Chabafy's recollection is at least as credible—and when combined with Special Agent Barnett's testimony at the August 26, 1996 probable cause hearing, the absence of a written waiver of rights form, and Mr. Friedemann's contemporaneous representation of himself as Chabafy's attorney--perhaps more credible.

M&R at 10.

2. Evidence Seized from Briefcases and Bag.

Judge Horn concluded that the searches of the briefcases and additional bag "were proper both as searches incident to lawful arrests and pursuant to properly issued search warrants." M&R at 10. He determined that probable cause existed at the time of the initial search and that the totality of the circumstances permitted a warrantless search of the bags. Judge Horn further found that the Government properly obtained the warrants, and that Defendant Friedemann's status as an attorney was "legally irrelevant." Finally, he determined that Defendant's arguments based on attorney-client privilege are inapplicable in that the "crime-fraud" exception obviates any such claim of privilege.

C. Objections.

1. Defendants' Objections.

Defendants object to Judge Horn's recommendation as to the contents seized from their briefcases and bag, arguing that the search was not valid either as incident to lawful arrest or pursuant to properly issued search warrants.

a. Searches Incident to Lawful Arrest.

Defendants assert:

> The bulk of the Magistrate Judge's analysis centers on the well-settled law concerning searches incident to arrest; very little analysis addresses the real issue before the Court - - that is, whether the Franks violation negated probable cause of the search warrant issued for the more extensive subsequent search and seizure of the briefcases [see subsection "b" infra]. The Defendants do not dispute that the federal agents had a limited right to conduct the initial search of the briefcases incident to the Defendants' arrests, despite the obvious lack of any evidence to support even a suggestion of danger to the agents. However, a search incident to arrest does not allow a wholesale search and seizure of the contents of the briefcases.

Defendants' Objections at 5. Defendants further note that, "[p]resumably, even the federal agents investigating this case knew that only a 'protective' search was warranted because they did not open any of the contents of the briefcases at the time of the initial search." Id, n.4.

b. Searches Pursuant to Search Warrants.

Defendants object to Judge Horn's conclusions of law in that his analysis ignored that the agents deliberately and wrongfully omitted from the affidavit in support of the search warrants the fact that Defendant Friedemann was an

attorney who carried documents protected by the attorney-client privilege.[1] Defendants argue that said omission constituted a violation of Franks v. Delaware, 438 U.S. 154 (1978), and that the proper remedy for such a flagrant violation is suppression of all evidence seized pursuant to the warrants.

Upon Franks and its progeny, all items seized pursuant to a search warrant are subject to suppression if (1) a material fact was omitted from the search warrant either intentionally or in reckless disregard for the truth, and (2) the omission of this fact negates probable cause. Defendants assert that, "[i]f this evidentiary standard is met, the warrant 'must be voided and evidence or testimony gathered pursuant to it must be excluded.'" Defendants' Objections at 6 (quoting United States v. Colkley, 899 F.2d 297, 300 (4th Cir. 1990); Franks, 438 U.S. at 156)

Defendants contend that the agents' omission from the affidavit that Friedemann was an attorney asserting attorney-client privilege was material in that disclosure of such information would have resulted in Judge Horn conducting an *in camera* review to determine which documents were subject to attorney-client privilege. Defendants argue that the omission was intentional and that it negated probable cause in the sense that it prevented Judge

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[1] Defendants also argue that this omission cannot be cured by Agent Bodee's alleged unrecorded statement to Judge Horn that Defendant Friedemann was an attorney because Rule 41(c) of the Federal Rules of Criminal Procedure prohibits the magistrate judge from considering information not contained in the affidavit before ruling on a request for a warrant. Defendants' Objections at 13-16 (quoting United States v. Acosta, 501 F.2d 1330, 1334, remanded on other grounds, 509 F.2d 539 (5th Cir. 1974), as follows:

> "[T]he weight of authority clearly is that any information relied upon by a federal magistrate in determining whether probable cause exists must be made part of the affidavit or affidavits supporting the warrant...")

Horn from conducting an *in camera* review and that such review would have revealed that most, if not all, of the documents were privileged. Defendants further maintain that the Government could not show that the crime-fraud exception applied to most of the documents in question. Finally, Defendants assert that the Franks violation here is sufficiently flagrant to warrant blanket suppression of the items in question. Defendants' Objections at 11-13 (citing United States v. Medlin, 842 F.2d 1194 (10th Cir. 1988) for the proposition that where the execution of a warrant greatly exceeds its scope, the warrant is constitutionally defective and all evidence seized pursuant to the warrant should be suppressed).

2. Government's Objections.

The Government objects to Judge Horn's recommendation regarding Defendant Chabafy's post-arrest statements. The Government summarizes its version of the relevant facts as follows:

> Immediately after his arrest, Defendant Chabafy was advised of his Miranda rights. Chabafy acknowledged his rights, including his right to an attorney, and consented to an interview by the agents. Chabafy was taken to [sic] room adjoining the room where the undercover meeting had occurred. Chabafy was readvised of his rights by the agents, acknowledged his understanding of those rights and consented to an interview.
>
> Defendant Chabafy thereafter provided a detailed statement to the agents...At the outset of the interview, Chabafy was questioned concerning his relationship with Friedemann. "Chabafy

> advised that although Friedemann is an attorney, Friedemann is not on retainer as an attorney for Chabafy. Chabafy advised that he has not paid Friedemann for any legal advice, nor does Friedemann function as a[n] attorney for Chabafy or Chabafy's company".
>
> Later in the interview, Chabafy stated that he was unable to answer some of the questions posed by the investigating agents. "At this point in the interview, Chabafy stated that if Friedemann were present, Friedemann could provide [the] interviewing agents with many details which were unknown to Chabafy."...
>
> As a result of this statement, and in an abundance of caution, the agents readvised Chabafy of his right to terminate the interview or to have an attorney present during the questioning. Again, Chabafy acknowledged his understanding of his rights and agreed to continue the interview.

Government's Objections at 3-4 (citations omitted).

The Government asserts that this version of events was memorialized in a memorandum of interview and that Agents Bodee, Barnett and Walsh all reviewed the memorandum and signed or initialed it as accurately representing what happened at the interview. Furthermore, the Government points out that Agents Bodee and Barnett have testified consistent with this recitation of events. The Government acknowledges that Agent Barnett stated at the probable cause hearing that Chabafy asked for his attorney to be present but notes that he later "clarified" his statement to mean that Chabafy asked for Friedemann, an attorney, to be present to better answer some of the agents' questions.

Based on this version of events, the Government argues that Judge Horn's conclusions concerning the suppression of Defendant Chabafy's statements are clearly erroneous and contrary to law in that he based his recommendation on factors not supported by the record, failed to consider the totality of the circumstances concerning the interview, and applied the wrong legal standard. Government's Objections at 7. First, the Government contents that Defendants have produced no evidence that, at the time of their arrest, Friedemann represented himself as Chabafy's attorney.

Second, the Government maintains that Judge Horn's credibility determination is contrary to the weight of the evidence and is entitled to no deference in this Court's *de novo* review. The Government asserts that Agent Bodee's testimony that he gave Chabafy Miranda warnings on at least two occasions and that Chabafy said he understood his rights is undisputed and that said testimony is corroborated by Bodee's prior consistent statement in the memorandum of interview, by Agent Barnett's testimony and initialing of the memorandum, and by Agent Walsh's initialing of the memorandum. The Government compares the credibility of this testimony with the credibility of Chabafy's testimony, which the Government describes as self-serving and inconsistent. The Government states that Judge Horn ignored the inconsistencies in Chabafy's testimony such as his admission that he was advised of his rights, including his right to counsel and that he understood his rights but that, when he tried to exercise his right to counsel, the agents forced him to answer questions over his protests. The Government argues that such testimony is not credible, especially in light of Chabafy's education and business sophistication.

Third, regarding the magistrate judge's failure to consider the totality of the circumstances, the Government notes that the agents honored Friedemann's refusal to consent to the search of his bags and his request to have an

attorney present and that it does not make sense that the agents would, at the same time, not honor a similar request from Chabafy. Furthermore, the Government points out that, when Chabafy mentioned Friedemann, an attorney, could better answer some of the agents' questions, the agents took the precautionary step of reminding Chabafy of his right to counsel, but Chabafy consented to continue with the interview.

Fourth, the Government argues that, even if Chabafy did request Friedemann to be present as his attorney, his request was ambiguous, and, under Davis v. United States, 512 U.S. 452 (1994), the agents were not required to cease the interview. Finally the Government contends that the magistrate judge applied the wrong legal standard in stating the "the undersigned cannot conclude with any degree of confidence that Chabafy waived his right to counsel and agreed to the interview in question." The Government asserts that the proper standard is simple preponderance of the evidence and that Judge Horn's conclusion is erroneous to the extent he held the Government to a higher standard than preponderance of the evidence.

IV. Motion to Compel Disclosure of Exculpatory Material.

A. Judge Horn's Order.

By motions filed June 12, 1997, Defendants requested that the Court compel the Government to disclose exculpatory material in the hands of Canadian authorities. That same day, the Government responded that it already agreed to provide whatever requested information it had in its possession but that it was unable to demand any information from Canadian officials.

By order of June 13, 1997, Judge Horn directed that AUSA David Brown provide a statement to the Court regarding the Government's efforts to comply with

Defendant's request for exculpatory information and that the Government make a diligent, good faith effort to identify, obtain, and produce the subject documents.

B. The Government's Appeal.

The Government responded to Judge Horn's order by appealing the order and stating that its direction of the Government to seek to obtain evidence in the possession of Canadian law enforcement authorities on behalf of Defendants is clearly erroneous and contrary to law. The Government argues that possession is a prerequisite to any obligation to produce exculpatory materials under Brady v. Maryland, 373 U.S. 83 (1963), and that, because the Government is in neither actual nor constructive possession of the information in question, the due process concerns of Brady are inapplicable here.

C. Defendants' Response.

Defendants responded to the Government's appeal on July 2, 1997, contending that the Government cannot rely on its "lack of possession" argument to avoid its obligations under Brady. Defendants maintain that the investigation in this case was a coordinated effort by United States and Canadian law enforcement officers and that, as a result, Canadian law enforcement officials are part of the "prosecution team," and the Government must do all it can to produce exculpatory material in the hands of the other members of the "team." Defendants' Response at 3 (citing, e.g., United States v. Brooks, 966 F.2d 1500 (D.C. Cir. 1992); United States v. Auten, 632 F.2d 478 (5th Cir. 1980)).

V. Hearing of July 31, 1997.

A. Defendants' Evidence

At the July 31st hearing, Defendant Chabafy testified that, during the interview at issue, he requested on three separate occasions that Defendant Friedemann be present as his attorney. Chabafy stated that he made these requests to protect his legal rights.

On cross-examination, Defendant Chabafy denied that this version of events was any different that what he told Judge Horn at the suppression hearing. When confronted with Agent Bodee's previous testimony that he (Chabafy) knowingly waived his right to counsel, Chabafy disagreed with Bodee's account and testified that he, at the time of the interview, did not understand his right to remain silent.

Agent Bodee testified that he had a waiver of rights form with him at the time of the interview but, despite his knowledge that the existence of such a waiver is often a contested issue in a criminal case, declined to provide the form to Defendant Chabafy. Agent Bodee stated that, although he knew at the time he prepared the affidavit in question that Defendant Friedemann was an attorney and that a magistrate judge can only rely on the "four concerns" of the affidavit, he did not mention in the affidavit Defendant Friedemann's status as an attorney or claim of privilege. With respect to the motion to compel, Agent Bodee testified that, while investigating the case in Canada, he had access to the original deposit documents for the CD at issue.

On cross-examination, Agent Bodee stated that Chabafy, at the time of the interview, described Friedemann as a business partner, not his attorney. Bodee testified that he specifically asked Chabafy if he wanted Friedemann present because he (Chabafy) had a right to an attorney but that Chabafy said the reason was Friedemann's knowledge of the transactions.

Also, Bodee stated that, when he prepared the affidavit, he did not think an attorney-client privilege existed between Defendants Friedemann and Chabafy. In response to a question from the Court, Bodee admitted that he should have considered that Friedemann may have been asserting attorney-client privilege on behalf of a client other than Chabafy. Finally, Agent Bodee described the many efforts he had taken to obtain the documents sought by Defendants.

B. Government's Evidence.

FBI Supervisory Special Agent Walsh testified that, as soon as Defendant Chabafy stated that he wanted Defendant Friedemann present as his attorney, Walsh's agents terminated the interview. Walsh also stated that he was present when Chabafy described Friedemann as his partner, not his attorney, and that he wanted Friedemann present to answer questions about the transactions.

On cross-examination, Agent Walsh admitted that he was not present at the beginning of the interview and would not have heard whether Chabafy asked for Friedemann to be present as his attorney from the outset. Agent Walsh testified that he never spoke with Agent Barnett about Barnett's testimony and was unaware of any inconsistency therein.

C. Court's Questions Regarding Motion to Compel.

In response to the Court's query whether Agent Bodee's recitation of his efforts to obtain the documents sought by Defendants mooted the Government's appeal of Judge Horn's order, AUSA Brown said that he did not think so because the Government did not want to undertake any obligation under Brady. Defendants argued that a Brady issue would exist if they did not receive the requested documents.

VI. Hearing of August 21, 1997.

Because Agent Barnett was not present at the July 31st hearing and the Court determined that an examination of his credibility and alleged inconsistent testimony is critical to resolution of the motion to suppress, the Court continued the hearing until such time as Agent Barnett would be available. The Court reconvened the hearing on August 21, 1997.

A. Agent Barnett's Testimony.

1. Defendants' Questions.

Agent Barnett stated that it was FBI policy to obtain from a suspect a written waiver of rights form before conducting an interview unless the suspect refuses or it is impractical to do so and that he has no explanation why the agents did not obtain such a form from Chabafy. Agent Barnett also explained that his statement at the probable cause hearing, that Chabafy asked for his attorney, was a reference to Chabafy's asking that Friedemann, an attorney, be present to answer some of the agents' questions.

2. Government's Questions

Agent Barnett again stated that his recollection was that Chabafy, in the middle of the interview, said that some of the questions could best be answered by Friedemann, who was an attorney. Barnett recalled Bodee informing Chabafy that Friedemann was also in custody and asking Chabafy if he was invoking his right to counsel. Barnett stated that Chabafy answered "no" and indicated his willingness to continue the interview. Agent Barnett further testified that, had he understood Chabafy's reference to an attorney to be an assertion of his right to counsel, he would have terminated the interview and that, in 10 years as an agent, he has never

continued to question a suspect who invoked his right to counsel.

B. Summations.

1. Defendants' Arguments.

With respect to items seized from their bags, Defendants reiterated their argument that Agent Bodee's omission from the affidavit that Friedemann was an attorney asserting privilege constituted a Franks violation negating probable cause for the search and seizure. Defendants maintained that the Court can only consider the four corners of the affidavit and that Bodee's omission, in light of his experience, constituted recklessness. Defendants argued that the issue was one of constitutional compliance versus expediency and the Court should not sacrifice the former in favor of the latter.

Regarding Chabafy's statements, Defendants stated that a clear Miranda violation occurred given Chabafy's consistent testimony that he invoked his right to counsel and the agents' inexplicable failure to obtain a written waiver of rights form. Defendants cite Smith v. Illinois, 469 U.S. 93 (1984), for the proposition that an accused's postrequest responses to further interrogation may not be used to cast doubt on the clarity of his initial request for counsel.

2. Government's Arguments.

The Government contended that Defendants are improperly raising the issue of a Franks violation in that Friedemann's status as an attorney was irrelevant to the issue of probable cause for the search warrant. Also, the Government argued that Agent Bodee's omission did not rise to the level of recklessness necessary to constitute a Franks violation and that, in any event, Judge Horn had independent

knowledge that Friedemann was an attorney at the time he issued the warrant.

Regarding the Miranda issue, the Government argued that Chabafy's testimony is not credible in that his testimony before this Court was wholly manufactured and completely different form previous testimony whereas Agent Barnett's testimony was credible and consistent with the testimony of the other agents.

VII. Analysis.

A. Motion to Suppress.

1. Chabafy's Statements.

The Court agrees with Judge Horn's conclusion that: (1) there is no dispute that Miranda applies and that, if Chabafy asserted his right to counsel, further custodial interrogation should have ceased; and (2) the only dispute is whether or not Chabafy waived his right to counsel and whether or not he identified Friedemann as his attorney. The Court finds that resolution of this dispute is essentially a credibility determination and concludes, upon a *de novo* review of the record and the testimony before the Court, that the agents are far more credible in their account of the arrest and interview of Chabafy than Chabafy is himself. Thus, the Court finds that Chabafy's Miranda rights were not violated and that his statements should not have been suppressed.

The agents have consistently testified that Agent Bodee gave Chabafy his Miranda rights and that Chabafy said he understood his rights but consented to the interview anyway. The only discrepancy was Agent Barnett's comment at the probable cause hearing, and he later explained that discrepancy to the Court's satisfaction. Furthermore, it strains credulity for the agents to have honored Friedemann's invocation of his right to counsel

while simultaneously ignoring a similar invocation by Chabafy.

By contrast, Chabafy's testimony at various stages of this case has varied widely and his latest testimony before the Court is much more consistent with this self-interest in having his statements suppressed than it is with the weight of the evidence and the totality of the circumstances surrounding his arrest and interview. At best, Chabafy's request for an attorney was ambiguous and, in such a situation, it is clear under Davis, supra, that the agents were not required to cease the interview. 512 U.S. at 459 (stating that "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning"). In fact, at the time of Chabafy's ambiguous request, the evidence shows that agent Bodee took the extra step of again advising Chabafy of his rights and asking him if he wanted an attorney, an offer which Chabafy declined.

While it is regrettable that the agents failed to obtain a written waiver from Chabafy and indeed is not satisfactorily explained by the agents given the admitted policy of the FBI, the greater weight of the evidence establishes that Chabafy was made aware of his rights and understood those rights but consented to answer the agents' questions. Therefore, the Government's evidence meets the preponderance of the evidence standard, and the Court finds no grounds for suppressing Chabafy's statements.

2. Materials Seized From Defendants' Briefcases and Additional Bag.

a. Searches Incident to Arrest.

Defendants are correct in noting in their objections that the "search incident to arrest" basis for searching and

seizing the contents of Defendants' briefcases and bags is not the real issue before the Court for the simple reason that the search and seizure in question was not, in fact, incident to Defendants' arrest but rather was pursuant to search warrants issued by the magistrate judge. Thus the Court finds that the law concerning searches incident to lawful arrest is not applicable to this case because the items seized were not the product of such a search.

However, even if the documents in question were seized after searches incident to the lawful arrest of Defendants, the law concerning such searches does not permit the kind of search that would have resulted in the seizure of the documents. While warrantless searches are permitted incident to lawful arrests, as here, such searches are limited in scope to the body and clothing of the arrested person, the area within his immediate control, and items in plain view in the room in which he was arrested. The scope of such searches does not include closed or concealed areas in the room of arrest or sealed or locked containers, such as the briefcases and bag at issue here. See, e.g., U.S. v. Chadwick, 433 U.S. 1 (1977); U.S. v. Presler, 610 F.2d 1206, 1212-13 (4th Cir. 1979) (stating that the Fourth Amendment bars warrantless searches of personal luggage and noting that a defendant's failure to lock the suitcase or briefcase does not alter its character as a repository for personal effects); see generally Wright, Federal Practice and Procedure: Criminal 2d § 667. Furthermore, the absence of any suggestion of danger to the agents coupled with Friedemann's assertion that the contents of his bags were privileged obviated the kind of general exploratory search that would have resulted in the seizure of the documents in question here.

b. Searches Pursuant to Warrants.

To obtain an evidentiary hearing regarding a potential Franks violation, Defendants must make a showing that:

(1) a material fact was omitted from the search warrant either intentionally or in reckless disregard for the truth, rendering the affidavit misleading; and
(2) the omitted information is essential to the probable cause determination.

United States v. Colkley, 889 F.2d 297, 300 (4th Cir. 1990). If a Franks hearing is appropriate and an affiant's material perjury or recklessness is established by a preponderance of the evidence, the warrant "must be voided' and evidence or testimony gathered pursuant to it must be excluded." Id. (quoting Franks v. Delaware, 438 U.S. 154, 156 (1978)).

The Court finds that Defendants made a sufficient showing to warrant a Franks hearing and, after conducting such hearing, the Court agrees with the Defendants that the agents' failure to disclose on the affidavit that Defendant Friedemann was an attorney who refused to consent to the search of his bags on the grounds the contents were protected by attorney-client privilege constitutes a Franks violation. The Court further finds that the violation was so flagrant that the warrants in question must be voided and all evidence gathered pursuant to them must be suppressed.

(1) Omission of Material Fact.

As to the first element, there is no dispute that the affidavit in support of the search warrants contained no reference to the fact that Defendant Friedemann was an attorney asserting attorney-client privilege. It is irrelevant whether or not Judge Horn, prior to or contemporaneous with the issuance of the warrants, learned of Defendant Friedemann's status as an attorney from sources outside the four corners of the affidavit. Rule 41(c) of the Federal Rules of Criminal Procedure prohibits a magistrate judge from

considering matters not in the affidavit in deciding whether to issue a search warrant. Even if Rule 41(c) did not apply here, there is no evidence that Judge Horn had any knowledge of Defendant Friedemann's assertion of attorney-client privilege, which is really the critical component of the omission from the affidavit, not Friedemann's mere status as an attorney.

Thus, since there is no question the agents omitted facts from the affidavit, the next issue is whether or not such facts were "material". The Court concludes that the omitted facts were indeed material.

First, it is clear that an attorney may and, under appropriate circumstances, should assert attorney-client privilege on behalf of a client. See Fisher v. United States, 425 U.S. 391, 402 n.8 (1976) (stating that "it is universally accepted that the attorney-client privilege may be raised by the attorney"); In re Grand Jury Proceedings, 727 F.2d 1352 (4th Cir. 1984) (holding that attorney subpoenaed to testify before grand jury is entitled to raise attorney-client privilege on behalf of his alleged client as objection to proposed interrogation). Thus, Defendant Friedemann, at the time of his arrest and his refusal to consent to the search of his bags, had standing to assert attorney-client privilege as the grounds for said refusal on behalf of his alleged client, Defendant Chabafy, or on behalf of any other client.

Second, had Judge Horn been informed that Defendant Friedemann refused to consent to the search of his bags on the grounds the contents were protected by attorney-client privilege, he would have been alerted to potential privilege issues regarding the contents of both defendants' briefcases and Defendant Friedemann's additional bag, and he would likely have conducted an *in camera* review of all such contents to see if the privilege attached to any items and, if so, whether the privilege was obviated by the crime-fraud exception. Therefore, Defendants were prevented the opportunity to have items in their bags exempt from search and seizure. Such loss of opportunity is undoubtedly

"material" to the interests of Defendants. That the crime-fraud exception may apply to most or all otherwise privileged materials in Defendants' bags does not detract from the materiality of the omission and its prejudicial effect on Defendants' rights.

Similarly, these reasons demonstrate that the omission rendered the affidavit misleading. Had Judge Horn known of the assertion of attorney-client privilege, his decision-making process regarding the issuance of the warrants would have been different. In this sense, the omission was undoubtedly misleading.

Given the Court's determination that the agents omitted material facts from the affidavit, rendering the affidavit misleading, the next inquiry involves whether or not the omission was intentional or made with reckless disregard for the truth. The Court finds that it was.

There is no disagreement that Agent Bodee, who prepared and signed the affidavit in support of the search warrants at issue, knew at the time of the issuance of the warrants that Defendant Friedemann was an attorney who had refused access to his briefcase and that he (Bodee) may also have known the refusal was based on an assertion of attorney-client privilege. Agent Bodee, a law school graduate, had experience in handling issues of attorney-client privilege. Furthermore, there is no dispute that FBI Special Agent Timothy Klund, working in conjunction with Agent Bodee, and Supervisory Agent Walsh, Bodee's boss, both knew that Defendant Friedemann asserted attorney-client privilege.

These facts, taken together, lead the Court to the conclusion that the omission was at least made with reckless disregard for the truth. It is hard to imagine that an FBI agent with Agent Bodee's experience and knowledge of the situation would omit references to Friedemann's status as an attorney and to his claims of attorney-client privilege through mere negligence or inadvertence. The potential impact on the search warrants of Friedemann's status as an

attorney and claim of privilege, whether on behalf of Chabafy or some other alleged client, could not have been lost on Agent Bodee and the other agents, and their failure to bring such information to Judge Horn's attention at the time they obtained the warrants is inexcusable. This conclusion is further supported by Agent Bodee's failure to obtain a Miranda waiver form in contravention of the policy requirements in effect in his office.

(2). Negation of Probable Cause.

Given that the Court has determined that the first element of a Franks violation is present, the Court must next consider whether the omission of these material facts from the affidavit was essential to the probable cause determination. For largely the same reasons that the omission was material and misleading, the Court concludes that the omission also was essential to Judge Horns' determination that probable cause existed to support the search warrants in question.

Had Agent Bodee disclosed in the affidavit that Defendant Friedemann was an attorney who had asserted that attorney-client privilege protected the items in his briefcase and bag, Judge Horn would have considered the issue of privilege before issuing the warrants as to either defendant's briefcase or Defendant Friedemann's additional bag. In considering the privilege issue, Judge Horn would likely have conducted an *in camera* review of the items from all the bags in question to determine if the privilege applied and, if so, whether it was removed by the crime-fraud exception. Such a review may have resulted in items being excluded from the coverage of the search warrants. Because the omission from the affidavit deprived Defendants the opportunity of such a review, the omission negated the probable cause Judge Horn believed existed to issue the search warrants in the manner they were issued.

(3). Remedy for Franks Violation.

As stated earlier, if Defendants are able to establish a defective affidavit under Franks, as here, then the warrants issued on the basis of the affidavit "must be voided" and evidence gathered pursuant to them must be excluded. Thus, because the Court finds that a Franks violation occurred with respect to Agent Bodee's affidavit and such violation was particularly flagrant, the Court concludes that the warrants to search the defendant's briefcases and Defendant Friedemann's additional bag are void and orders that all evidence obtained pursuant to the warrant is excluded.

B. Motion to Compel Disclosure of Exculpatory Material.

The Court need not reach the issue of whether the Government is required under Brady to produce Defendants' requested exculpatory materials from Canadian law enforcement officials. Instead, the Court finds that, in the exercise of its inherent supervisory authority, it is entirely appropriate to require the Government to adhere to Magistrate Judge Horn's order, directing AUSA Brown to make a "diligent, good faith effort to identify, obtain and produce the subject documents" and provide the Court a statement detailing such efforts and listing the documents sought and their location, if known.

The Supreme Court, in United States v. Hastings, 461 U.S. 499, 505 (1983) (citations omitted), stated:

> "[G]uided by considerations of justice," ... and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress. The

> purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights ...; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury ...; and finally, as a remedy designed to deter illegal conduct ...

In a later case, the Supreme Court noted that a court may exercise its supervisory power "to improve the truth-finding process of the trial." United States v. Williams, 504 U.S. 36, 46 (1992).

Based on this authority, the Court concludes that the Government's compliance with Judge Horn's order will improve the truth-finding process of the trial and ensure that any conviction would rest on appropriate considerations validly before the jury. Defendants have requested exculpatory material from, or available through, Canadian law enforcement officials who were part of a coordinated effort with United States authorities that resulted in the indictment of Defendants. Judge Horn ordered the Government, through AUSA Brown, to make reasonably diligent efforts to identify and obtain from Canadian authorities the items sought by Defendants. The Court finds that Judge Horn's order is consistent with the purposes behind the Court's supervisory powers and that compliance with the order would not unduly burden or prejudice the Government.

VII. Conclusion.

Based upon the foregoing, the Court **ORDERS**:

(1) That the recommendation to grant Defendant's Motion to Suppress as to Defendant Chabafy's statements is incorrect.

Instead, the court **ORDERS** that this portion of the Motion to Suppress is **DENIED**.

(2) That the recommendation to deny Defendants' Motion to Suppress as to items seized from Defendants' briefcases and Defendant Friedemann's additional bag is incorrect. Instead, the Court **ORDERS** that this portion of the Motion to Suppress is **GRANTED**; and,

(3) That Magistrate Judge Horn's order regarding Defendants Motion to Compel Disclosure of Exculpatory Material is correct and in accordance with the law and is therefore **AFFIRMED**.

Thus, Defendant's Motion to Suppress is **DENIED** as to Defendant Chabafy's statements but **GRANTED** as to items seized from Defendants' briefcases and Defendant Friedemann's additional bag. Furthermore, the Court **ORDERS** the Government to comply fully with Judge Horn's order regarding Defendant's Motion to Compel Disclosure of Exculpatory Material within 10 days of the entry of this order.

This 18th day of March, 1999.

\s\ _____
UNITED STATES DISTRICT JUDGE
GRAHAM C. MULLEN

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

DOCKET NO. 3:96CR146-MU

UNITED STATES OF AMERICA,

v.

FRANCIS K. FRIEDEMANN,
ARPAD A. CHABAFY.

Entered: May 30, 1997

MEMORANDUM AND RECOMMENDATION

THIS MATTER is before the Court on "Defendants' Motion To Suppress" filed April 3, 1997 (document #23), as amended by "Defendant Friedeman and Chabafy's Amendment To Their Motion To Suppress" filed May 9, 1997 (document #32). The "Government Response In Opposition To Defendants' Motions To Suppress" (document #31) was filed May 8, 1997, and a hearing was conducted May 13, 1997.

At the May 13, 1997 hearing, counsel for defendants orally moved to further amend their motion to suppress to plead a Rule 41 violation. Specifically, the defendants argue that information may have been orally communicated and considered by the undersigned in connection with issuance of the subject search warrants in violation of the requirements of Fed. R. Cr. P. 41(c)(2). Counsel for defendants requested and were granted an additional two weeks to brief this and any further issues they wish to address.

"Defendant Friedemann and Chabafy's Brief In Support Of Their Motion To Suppress" (document #37) was thereafter filed on May 27, 1997.

Having considered the arguments, record, and applicable authority, the undersigned will respectfully recommend that defendants' motion be granted in regard to defendant Chabafy's statements, but denied in regard to the items seized from the defendants' briefcases and defendant Friedemann's additional bag or "pouch."

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 21, 1996, the defendants met with an undercover agent with the Federal Bureau of Investigation (Special Agent Julia Marie Mueller) posing as a representative of a venture capital company. The purpose of this meeting was to execute a loan agreement pursuant to which the defendants would receive a $4.5 million loan.

During this meeting the defendants represented that the loan would be protected by a $5 million certificate of deposit which was being held in their behalf by a bank in Canada. In fact, the government had discovered and now alleges that the certificate of deposit had a value of only $5, 000.

During the course of their meeting with the undercover agent, which was videotaped, both defendants reviewed one or more documents presented to them by the agent and retrieved one or more documents from their respective briefcases. Both clearly intended for the agent to believe what the government knew, in fact, to be false: namely, that the $5 million certificate of deposit was valid and authentic. Once the defendants again confirmed the existence and validity of the $5 million in collateral, this time on videotape, both were arrested.

Immediately following their arrests the defendants were separated. Defendant Friedemann, who is himself an attorney, was advised of his Miranda rights, after which he

declined to answer any further questions. At this point no further questions were posed and defendant Friedemann made no other statements of any kind. Mr. Friedemann also declined to consent to agents reviewing the contents of his briefcase, identifying himself as an attorney and describing the materials in his briefcase as "privileged."

Defendant Chabafy, on the other hand, proceeded to make extensive statements to the interviewing agents--although he denies waiving his Miranda rights and, in fact, testified several times that he requested his attorney (Mr. Friedemann) be present. Nevertheless, Chabafy continued to answer many of the questions put to him by interviewing agents.

The government view of the communication with Mr. Chabafy is quite different. Specifically, as summarized in the FBI "302," the government asserts that Mr. Chabafy waived his Miranda rights; that he described Friedemann as his business partner, not his attorney; and that he said Friedemann had never been retained as an attorney or paid anything for his services as an attorney. According to the FBI 302, Chabafy further advised the interviewing agents that he did not know, but believed Friedemann would know, the source of the $5 million deposit; that he believed the "unknown investors" put up the $5 million without reviewing any financial statements of his business or any prospectus or other business information regarding the proposed project; and that he expected a Charlotte, North Carolina investment firm (Marion Bass Securities) to investigate the validity of the purported $5 million certificate of deposit.

Based on the evidence developed in the undercover "sting operation" and the further information noted in the affidavit (of FBI Special Agent Bart W. Bodee), the government obtained four search warrants, three of which authorized the search of the respective briefcases and Mr. Friedemann's additional bag or "pouch." The defendants object to the omission in Special Agent Bodee's affidavit of

any reference to the fact that the defendant Friedemann is an attorney, on the one hand, and to the possible oral communication of this fact to the undersigned in violation of Fed. R. C. P. 41(c)(2), on the other.

On September 3, 1996, the defendants were indicted for one count of mail fraud, three counts of wire fraud, and aiding and abetting the same.

On April 3, 1997, the subject Motion to Suppress was filed. As noted, the Motion to Suppress (as amended May 9, 1997) asks the Court to suppress evidence seized from the subject briefcases and pouch, and the statements made by defendant Chabafy following his arrest.

At the evidentiary hearing conducted by the undersigned on May 13, 1997, the government called three witnesses: FBI special agent Timothy B. Klund; FBI Special Agent Bart W. Bodee; and FBI Special Agent James E. Barnett, Jr.

Special Agent Klund testified that he participated in the arrest of Friedemann on August 21, 1996; that he made a cursory search of the contents of Friedemann's briefcase incident to his arrest; that he was searching primarily for weapons, and that no weapon was found; that he initially advised Friedemann of his Miranda rights and heard another agent advise him of his rights a second time; and that Friedemann immediately asserted his right to counsel and refused to sign the form (acknowledging that he had been advised of his Miranda rights).

On cross-examination, Special Agent Klund further testified that Mr. Friedemann represented himself to be an attorney; that he declined to consent to a search of his briefcase, describing the materials therein as "privileged"; and that he communicated this information to Special Agent Bodee, who was (and is) serving as the "case agent."

Special Agent Bodee testified that this case originated with information received from Mr. William A. Malloy regarding what he believed to be a "bogus" foreign currency deposit scheme; that a meeting was arranged

between the individuals identified by Mr. Malloy (the defendants) and Special Agent Julia Mueller, posing in an undercover capacity as a representative of a venture capital company based in New York; and that the undercover meeting was held and videotaped at the Hyatt Hotel in the Southpark area in Charlotte. Special Agent Bodee further testified that the defendants each brought a briefcase to the meeting and Mr. Friedemann brought an additional "small leather pouch"; and that during the undercover meeting, in which representations were made by the defendants falsely representing the subject certificate of deposit to be valid and authentic, both defendants "accessed" papers inside their respective briefcases. [1]

Once the defendants were arrested, Special Agent Bodee testified that he was in charge of the Chabafy interrogation; that he was assisted by Special Agent Barnett; and that Supervisory Special Agent Walsh was in the room part but not all of the time. Special Agent Bodee further testified that he made a cursory search for weapons (and found none) in Chabafy's briefcase; that he read Chabafy his Miranda rights from a government form (an "FD 395"); that Chabafy stated that he understood his rights and agreed to be interviewed; but that he "intentionally" chose not to obtain a written waiver of rights from Mr. Chabafy.

Regarding Mr. Chabafy's statements and representations concerning his right to counsel, Special Agent Bodee testified that Chabafy denied that Friedemann was his attorney, describing him instead as his "business partner"; that Chabafy stated that there was certain information Friedemann could provide which he could not provide; but that Chabafy never asked for Mr. Friedemann nor any other attorney to be present during the interrogation.

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[1] Special Agent Bodee specifically recalled that defendant Friedemann "accessed" his briefcase to provide instructions to Special Agent Mueller on how to wire the loan proceeds ($4.5 million) to the proper account.

On cross-examination, Special Agent Bodee testified that he was aware that Miranda rights/waivers can become issues in certain cases, as they have in this case; and that he was aware that waivers of Miranda rights are often obtained in writing as evidence of any such waiver. Special Agent Bodee also testified that he did not recall (until his memory was refreshed by reviewing the transcript) that Special Agent Barnett had testified at the probable cause hearing that Chabafy did request that Friedemann be present during the interrogation as "his attorney".

Regarding the affidavits in support of the search warrant, Special Agent Bodee testified that he included no mention of the fact that Mr. Friedemann was an attorney; but that he recalls orally communicating this fact to the undersigned, either when the search warrants were presented or perhaps earlier in connection with the defendants' initial appearance.[2]

The government's third witness, Special Agent Barnett, acknowledged (after having his memory "refreshed" by reviewing the transcript) that he testified five days after the subject arrest that Chabafy did, in fact, describe Friedemann as "his attorney"[3] and that he asked to have Friedemann ("his attorney") present during the interrogation. Although Special Agent Barnett sought to "clarify" his earlier testimony, it perhaps goes without saying that this

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[2] As indicated to counsel at the hearing, the undersigned regards what was communicated orally as legally irrelevant in that it was not relied upon in any event in issuing the subject search warrants. Furthermore, the fact that Friedemann is an attorney or claimed that the materials were "privileged" would have made no material difference in that the "crime-fraud" exception to the attorney-client privilege clearly applies to the facts of this case. For further discussion of this point, see Section IIB, infra.

[3] Special Agent Barnett's testimony was given at the probable cause hearing conducted by Magistrate Judge H. Brent McKnight on August 26, 1996. See page 21, line 14 for the pertinent statement.

contemporaneous testimony does much to cast doubt on the government's position some nine months later.[4]

Finally, the defendants presented the testimony of Mr. Chabafy, who testified that he was advised of his Miranda rights;[5] that he advised the interviewing agents that he wanted to have his attorney (Mr. Friedemann) present; that he was told that he could not have Mr. Friedemann present because he, too, was being interviewed; and that during the course of the interrogation he repeated his request "one or two more times." Mr. Chabafy further testified that he refused to consent to a search of his briefcase; that he never waived his right to counsel, in writing or otherwise; and that he explicitly requested but was denied Mr. Friedemann's presence during the interview.

Regarding his relationship with Mr. Friedemann, Mr. Chabafy testified that Friedemann was not his "personal or corporate attorney"; that he was not on "a retainer" on this or any other matter; but that Mr. Friedemann was serving as the attorney for his business on this particular project.[6]

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[4] The government's position, as capsulized in Special Agent Bodee's testimony, is that Chabafy only referred to Friedemann as his business partner; that he waived his right to counsel generally and agreed to be interviewed; and that the only statements regarding Mr. Friedemann's presence were Chabafy's representations that if he were present, Friedemann could answer certain questions Chabafy was unable to answer.[9] Special Agent Barnett's "clarification" seeks to bring his earlier testimony in line with the government's position.

[5] Mr. Chabafy testified that he may have been advised of his Miranda rights in the hotel hallway at the time of his arrest, but that he definitely recalls being advised of his rights once he was seated in the hotel room for custodial interrogation.

[6] With the exception of his "clarification," Special Agent Barnett's testimony at the August 26, 1996 probable cause hearing is essentially consistent with Mr. Chabafy's recollection and testimony.

II. DISCUSSION OF CLAIMS

A. Statement of defendant Chabafy

The law governing admissibility of Chabafy's statements is not in substantial dispute. Miranda warnings are required when a subject is interrogated either in custody or its functional equivalent. Miranda v. Arizona, 384 U.S. 436 (1966). It is agreed that at the time the subject statements were made defendant Chabafy was, in fact, in custody. It is further agreed that the statements made were in response to custodial interrogation, and that none of the recognized exceptions to the Miranda requirements apply.

Assuming Miranda applies, however, a defendant may waive his rights and submit himself to custodial interrogation--which is what the government contends occurred in this case. Moreover, to be valid, the waiver "need not be explicit, but may be inferred from all the circumstances." United States v. Hicks, 748 F.2d 854, 859 (4th Cir. 1984); accord Moran v. Burbine, 475 U.S. 412, 421 (1986); United States v. Frankson, 83 F.3d 79, 82-83 (4th Cir. 1996) (finding "implied waiver" in defendant's willingness to answer questions after being advised of rights); and United States v. Gordon, 895 F.2d 932, 939 (4th Cir.), cert. denied, 498 U.S. 846 (1990).

Although they sharply disagree on whether defendant Chabafy asserted his right to counsel--the parties agree that once the right to counsel is asserted, further custodial interrogation must cease. On this point, see, e.g., Minnick v. Mississippi, 498 U.S. 146 (1990); Colorado v. Connelly, 479 U.S. 157, 168 (1986); and Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (once right to counsel is asserted, custodial interrogation may not resume "unless the accused himself initiates further communications, exchanges, or conversations with the police").

As noted, where the defendants and the government sharply disagree is over whether Chabafy waived his

Miranda rights and/or requested the presence of counsel during the custodial interrogation. The government contends that Chabafy waived his rights, including his right to counsel, and that Chabafy repeatedly described Friedemann as his "business partner" rather than as his attorney. Chabafy, on the other hand, emphatically denies ever waiving his right to counsel and testified that he requested that his attorney (Mr. Friedemann) be present on at least two or three occasions. Mr. Chabafy concedes that he advised interviewing agents that Friedemann does not represent him personally or serve as his corporate attorney, but insists that Friedemann was representing his business on this particular project.

On this record, the undersigned cannot conclude with any degree of confidence that Chabafy waived his right to counsel and agreed to the interview in question. To the contrary, Mr. Chabafy's recollection is at least as credible- -and when combined with Special Agent Barnett's testimony at the August 26, 1996 probable cause hearing, the absence of a written wavier of rights form, and Mr. Friedemann's contemporaneous representation of himself as Chabafy's attorney- -perhaps more credible.

On this record, therefore, the undersigned concludes that Chabafy's statements made during the uncounselled custodial interrogation should be suppressed.

B. Contents of briefcases and Friedemann's "pouch"

On the other hand, the searches of defendants' briefcases and Friedemann's additional bag or "pouch" were proper both as searches incident to lawful arrests and pursuant to properly issued search warrants.

Warrantless arrests- -and searches incident thereto-- are permitted where there is probable cause to believe a felony is being or has been committed by the arrested individual, based upon "the totality of the circumstances."

Illinois v. Gates, 462 U.S. 213, 230-31 (1983); United States v. Watson, 423 U.S. 411 (1976) (warrantless arrest permitted if officer has probable cause to believe a felony has been committed, even if committed outside officer's presence); United States v. McCraw, 920 F.2d 224, 227 (4th Cir. 1990); United States v. Garcia, 848 F.2d 58, 59-60 (4th Cir.), cert. denied, 488 U.S. 957 (1988).

There was clearly probable cause to arrest the defendants on August 21, 1996 for commission of one or more of the federal felonies for which they were ultimately indicted. Therefore, there was also probable cause to search the briefcases and bag in question incident to their lawful arrests.

As the Supreme Court stated in Illinois v. Gates, 462 U.S. at 232, "probable cause is a fluid concept- -turning on the assessment of probabilities in particular factual contexts- -not readily, or even usefully, reduced to a neat set of legal rules." The next year, the Fourth Circuit articulated the probable cause standard as "facts and circumstances within the officer's knowledge [which] would warrant the belief of a prudent person that the arrestee had committed or was committing an offense." United States v. Manbek, 744 F.2d 360, 376 (4th Cir. 1984), cert. denied, 469 U.S. 217 (1985). See also United States v. Cortez, 449 U.S. 411, 418 (1981) (advocating a "common sense" approach); and United States v. Hummer, 916 F.2d 186, 190 (4th Cir. 1990) ("combination of factors" may add up to probable cause to arrest), cert. denied, 499 U.S. 970 (1991).

Searches incident to arrest are a well established exception to the warrant requirement of the Fourth Amendment. See, e.g., Michigan v. DeFillippo, 443 U.S. 31, 35 (1979); United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752, 762-63 (1969) and United States v. Miller, 925 F2.d 695, 698-99 (4th Cir.), cert. denied, 502 U.S. 833 (1991).

Search incident to arrest is allowed of a bag or container initially observed in close proximity to a

defendant, even though officers have "separate[d] the suspect from the container to be searched, thereby alleviating safety concerns, before they conduct the search" Han, 74 F.3d at 542, citing New York v. Belton, 453 U.S. 454, 456 (1981) and United States v. Litman, 739 F.2d 137, 138 (4th Cir. 1984) (en banc). That is precisely the factual situation presented in the case at bar.

Nor is the delay between arrest and search of a bag incident to arrest of any constitutional or legal moment. "[W]e hold that when a container is within the immediate control of a suspect at the beginning of an encounter with law enforcement officers; and when the officers search the container at the scene of the arrest, the Fourth Amendment does not prohibit a reasonable delay... between the elimination of danger and the search." Han, 74 F.3d at 543.

Applying these principles to this case, the agents were clearly entitled to search both briefcases and Mr. Friedemann's pouch--without the benefit of any search warrant--incident to the defendants' lawful arrests. Furthermore, although the government's examination of its witnesses appeared to assume that the pre-warrant search must be limited to a protective search for weapons, this is not a limitation found in the law. Rather, search of the bags incident to arrest, if allowed at all, may be just as thorough as search pursuant to a search warrant.

Perhaps in an abundance of caution, however, FBI Special Agent Bodee did seek and obtain search warrants for the subject briefcases and pouch. These search warrants were based upon a finding of probable cause, which under clearly established law is to be shown "great deference." United States v. Blackwood, 913 F.2d 139, 142 (4th Cir. 1990); see also United States v. Williams, 974 F.2d 480 (4th Cir. 1992) (reversing suppression of evidence seized pursuant to search warrant, faulting district court for not giving proper deference to magistrate judge's probable cause determination); and United States v. McCall, 740 F.2d 1331 (4th Cir. 1984).

Nor, finally, are defendants' arguments based on attorney-client privilege well taken. Even assuming there was such a relationship, the so called "crime-fraud exception" would clearly and squarely obviate the privilege on the facts of this case. On this point, see, e.g., Clark v. United States, 289 U.S. 1, 15 (1933); In re Grand Jury Proceedings, 102 F.3d 748, 750-751 (4th Cir. 1996); In re Grand Jury Proceedings, 33 F.3d 342, 348 (4th Cir. 1994); and In re John Doe, 662 F.2d 1073 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).

The "crime-fraud exception" to the attorney-client privilege essentially provides that communications with counsel--whether written or oral--are not privileged when the purpose of those communications is to further a crime or fraud. That is precisely the case here--where it is not only alleged that the documents in question were being used to further a crime or fraud, but that both the client and attorney had criminal intent.

Simply put, the defendants should not be allowed to use the fact that one of them is an attorney to shield evidence of their alleged crimes from public view. Indeed, the defendants have cited no authority in which the attorney-client privilege has been so extended, and the undersigned is aware only of the contrary authority cited above.

For these reasons and on this record, therefore, the undersigned concludes that the items were properly seized from the defendants' briefcases and from Friedemann's additional bag or "pouch." Accordingly, the defendants' motion to suppress these items should be denied.

III. RECOMMENDATION

FOR THE FOREGOING REASONS, the undersigned respectfully recommends that "Defendants' Motion to Suppress" (document #23), as amended by "Defendant Friedemann and Chabafy's Amendment to Their Motion to Suppress" (document #32) be **GRANTED** in regard to

Chabafy's statements, but **DENIED** in regard to the items seized from defendants' briefcases and defendant Friedemann's additional bag or "pouch."

IV. NOTICE OF APPEAL RIGHTS

The plaintiff is hereby advised that, pursuant to 28 U.S.C. §636(b)(1)(C), written objections to the proposed findings of fact and conclusions of law and the recommendation contained in this Memorandum must be filed within ten (10) days after service of same. United States v. Ridenour, 889 F.2d 1363, 1365 (4th Cir. 1989); United States v. Rice, 741 F. Supp. 101, 102 (W.D.N.C. 1990). Failure to file objections to this Memorandum with the district court constitutes a waiver of the right to de novo review by the district court, Ridenour, 889 F.2d at 1365, and will preclude the parties from raising such objections on appeal. Thomas v. Arn, 474 U.S. 140 (1985), Wright v. Collins, 766 F.2d 841, 845-46 (4th Cir. 1985); United States v. Schronce, 727 .F2d 91, 93-94 (4th Cir.), cert. denied, 467 U.S. 1208 (1984).

The Clerk is directed to send copies of this Memorandum and Recommendation to counsel for the parties; and to the Honorable Graham C. Mullen.

SO ORDERED AND RECOMMENDED, this 30th day of May, 1997.

\s\ _____
CARL HORN
United States Magistrate Judge